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In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.

PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF INTEL CORPORATION, ELECTRONIC INDUSTRIES ALLIANCE AND ARIZONA ASSOCIATION OF INDUSTRIES, IN SUPPORT OF RESPONDENTS APPALACHIAN POWER COMPANY, ET AL.

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QUESTION PRESENTED

Whether the comprehensive framework and long term program Congress enacted in 1990 to achieve attainment of the then-existing ozone national ambient air quality standard ("NAAQS") restricts EPA's general authority under other provisions of the Clean Air Act to implement a new and more protective ozone NAAQS until the prior standard is attained.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae Intel Corporation, the Electronic Industries Alliance ("EIA"), and the Arizona Association of Industries ("AAI") advocate in rulemaking, policy-making and law-making venues to ensure that environmental programs are sufficiently protective, but do not impose undue impediments to operational flexibility. In particular, Intel has partnered with the Environmental Protection Agency ("EPA") and State agencies to develop permits that incorporate control measures and requirements in a manner that allows the flexibility to undertake the hundreds of process upgrades, advancements and innovations necessary

to compete in the global marketplace, control costs, maintain quality, meet corporate pollution prevention goals and satisfy new regulatory requirements. EIA represents its membership – comprised of technology-driven electronics companies – on air quality matters ranging from innovative programs to address emerging issues, such as climate change, to rulemakings under the Clean Air Act ("CAA" or "Act"), including the rulemaking at issue in this case. EIA's paramount goal has been to ensure the appropriate balance between environmental protection and operational flexibility. Finally, AAI has been a leader in promoting State adoption of ozone control measures ahead of schedule, but in a manner that does not significantly hamper growth. AAI members include many of Arizona's most prestigious manufacturing companies, from the State's largest private employers to small businesses. Most AAI members are located in Maricopa County, an area in Arizona classified as nonattainment for the current one-hour ozone standard.

To remain globally competitive, *amici* have a strong interest in ensuring that any revised ozone National Ambient Air Quality Standard ("NAAQS") is achievable and that its implementation is reasonable and predictable. Attainment of EPA's revised eight-hour NAAQS will impose substantial costs on the nation. EPA itself estimates that compliance with the new eight-hour ozone NAAQS will cost at least $9.6 billion per year *in addition to* the cost of compliance with the one-hour standard. Respondents Appalachian Power Co., et al. ("Industry Respondents") estimate the cost to be substantially higher. Moreover, EPA is seeking to implement the more stringent eight-hour standard immediately, even in areas that are still struggling to reach attainment with the one-hour standard. Much of this additional burden will be placed on industrial sources such as those of *amici*. *Amici* therefore have a substantial interest in ensuring that implementation of any revised NAAQS occurs in a reasonable, cost-effective manner consistent with the language and structure of the statute.

STATEMENT OF THIS CASE

Amici concur with and adopt the statement of the case proffered by Industry Respondents.

SUMMARY OF ARGUMENT

In 1990, Congress amended the Clean Air Act to create a detailed and comprehensive framework to address the failure of many areas of the country to attain compliance with the ozone NAAQS. The new framework, codified as Subpart 2 of Part D of Title I of the Act, classifies areas based on the severity of their ozone problem, provides milestones and deadlines for attainment, consequences for failure to meet those deadlines, and rules for continued maintenance of attainment levels. Despite Congress's express intent through Subpart 2 to provide a comprehensive regulatory framework for ozone attainment, EPA now asserts that it has the power simultaneously to enforce a revised (and more stringent) ozone standard, and to require attainment of this revised standard even before Congress directed that the old one be attained. EPA has no such authority. The regulations it has promulgated exceed EPA's statutory discretion, conflict facially with the plain language of the statute, and wholly undermine the purpose of the 1990 amendments.

1. Two different provisions of the Act theoretically could govern the implementation of EPA's revised ozone NAAQS: Subpart 1 of Part D of Title I (CAA §§ 171-179B; 42 U.S.C. §§ 7501-7509a) and Subpart 2 of Part D of Title I (CAA §§181-185B; 42 U.S.C. §§ 7511-7511f). Every party who has examined the question, however, agrees that implementation under Subpart 2 simply would be unworkable: Subpart 2 codifies design values, a classification scheme, and deadlines specifically tailored to the current, one-hour, 0.12 ppm ozone NAAQS, and this framework simply cannot be applied – from a plain language or practical standpoint – to the revised eight-hour, 0.08 ppm ozone NAAQS without producing absurd results. Only two

possible conclusions can be drawn: either the revised NAAQS. Only two possible conclusions can be drawn: either the revised NAAQS cannot be implemented at all *or* implementation of the revised NAAQS must occur under Subpart 1.

2. Industry Respondents maintain that the language, structure, and legislative history of the Act demonstrate that Congress intended Subpart 2 to constitute the comprehensive and exclusive framework for implementation of ozone NAAQS, and that EPA has no authority under Subpart 1 or Subpart 2 to implement a revised ozone NAAQS. We agree completely, but will not repeat those arguments here.

3. EPA not only asserts the authority to revise the NAAQS that Congress established in Subpart 2, and to implement its revised NAAQS under Subpart 1. The Agency claims, moreover, that it has the power under Subpart 1 to require an area to take all steps necessary to comply with its more stringent, revised NAAQS at the same time (or even before) the area was required by Congress to attain the less stringent NAAQS under Subpart 2. EPA's position cannot be reconciled with the language and structure of the statute or with its legislative history. If EPA has any power to enforce revised ozone NAAQS under Subpart 1, it could conceivably have that authority, consistent with the statute, only in areas that have already attained the existing one-hour 0.12 ppm NAAQS in accordance with Subpart 2.

4. EPA's assertion that it can implement a revised ozone NAAQS under Subpart 1 before an area has attained the NAAQS mandated by Congress in Subpart 2 is foreclosed by the plain language of the statute. Although Subpart 1 allows EPA generally to classify and set attainment dates for nonattainment areas, the statute expressly withholds such authority from EPA "with respect to nonattainment areas for which" classifications and attainment dates "are specifically provided under other

provisions of [Part D]." CAA § 172(a)(1)(C), (a)(2)(D), 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D). Classifications and attainment dates for "[e]ach area designated nonattainment for ozone" are "specifically provide[d]" under an "other provision" of Part D – Subpart 2. CAA §181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1. Accordingly, EPA has no authority under Subpart 1 to classify or to set attainment dates for areas that are not yet in attainment with the Subpart 2 NAAQS.

5. Simultaneous enforcement of the revised ozone NAAQS under Subpart 1 would also undermine the core purposes of Subpart 2. When Congress enacted Subpart 2 in 1990, it codified a considered and detailed plan to ensure progress towards, and eventual attainment of, the one-hour, 0.12 ppm ozone standard in all areas of the country. The requirements of Subpart 2 reflect a careful balance of environmental goals and economic realities, and a recognition that areas with more serious air quality problems need more time to reach attainment. Once enacted, the specifications of Subpart 2 stripped EPA and the States of much of the discretion they had enjoyed under Subpart 1 to determine when and how the ozone NAAQS would be attained.

6. EPA's interpretation of the statute would allow the Agency to circumvent and render meaningless Congress's comprehensive and reticulated legislative framework simply by revising the NAAQS. Under EPA's interpretation, for example, the Agency could have promulgated a more stringent revised NAAQS immediately after Subpart 2 was enacted and required areas to meet the original and revised NAAQS "simultaneously," such that areas which Congress had given 15, 17 or even 20 years to meet the 0.12 ppm NAAQS under Subpart 2 could have been forced, at the Agency's discretion, to meet in only five years the more stringent, revised NAAQS under Subpart 1. This Court should not lightly presume that Congress delegated to EPA

the discretion to make its comprehensive ozone attainment scheme utterly superfluous.

7. As the D.C. Circuit correctly held, the plain language and purpose of the 1990 amendments require implementation of any ozone NAAQS to occur "in conformity with Subpart 2." *American Trucking Ass'ns v.. Browner*, 195 F.3d 4, 10 (D.C. Cir. 1999) ("ATA II"). That necessarily means that, even if EPA has authority to implement a revised NAAQS under Subpart 1, an area must first adhere to the mandate of Subpart 2 – and only that mandate – until it has attained the preexisting NAAQS. EPA may not require an area simultaneously to undertake measures to attain a more stringent revised NAAQS.

ARGUMENT

I. EVERYONE AGREES THAT THE REVISED NAAQS CANNOT BE IMPLEMENTED UNDER SUBPART 2

The parties to this litigation have advanced various and conflicting interpretations of the interplay between Subpart 1 of Part D of Title I of the Clean Air Act, entitled "Nonattainment Areas in General" (*see* CAA §§ 171-179B, 42 U.S.C. §§ 7501-09a), and Subpart 2 of Part D of Title I, entitled "Additional Provisions for Ozone Nonattainment Areas" (*see* CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f). But no one – neither EPA nor industry (nor intervenors or *amici* in support of either EPA or industry) – has suggested that the revised ozone NAAQS can be implemented under Subpart 2. Everyone who has examined and taken a position on how Subpart 2 might apply to the revised ozone standard agrees that Subpart 2 implementation would be unworkable. The design values, classification scheme, and deadlines set forth in Section 181 of Subpart 2 establish a NAAQS implementation framework specifically tailored to the existing one-hour, 0.12 ppm NAAQS. This framework simply has no applicability to any revised ozone NAAQS. Indeed, any attempt by EPA to apply this framework to the

revised eight-hour, 0.08 ppm ozone NAAQS would produce nonsensical results.

To begin with, EPA's revised ozone standard cannot be used to classify areas under Subpart 2. Section 181(a)(1) requires that an area's design value (*i.e.*, the quantitative measurement of its air quality) – which determines the area's attainment/nonattainment status – "be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). In other words, Subpart 2 requires use of the *particular air quality measure* that was specifically developed for the ozone standard existing in 1990.[1] EPA's pre-1990 air quality measure for the 0.12 ppm NAAQS is based on a *one-hour averaging time* and an examination of the number of days the current standard is exceeded. 62 Fed. Reg. 38,856, 38,857 (1997), Ozone Joint Appendix in D.C. Cir. No. 97-1441 ("OJA") at 1, 2. In contrast, the revised 0.08 ppm standard is based on an *eight-hour averaging time* and a determination of whether certain readings exceed the revised standard.[2] Thus, compliance with the revised standard is based on an entirely different averaging period and statistical form than the existing standard. Because the form of the ozone standard

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1 The statute provides that if EPA modifies the design value in severe nonattainment areas, "a design value or other indicator *comparable to 0.140 in terms of its relationship to the standard* shall be used in lieu of 0.140. . . ." *See* CAA § 181(b)(4)(D), 42 U.S.C. § 7511(b)(4)(D). This is the only context in which the statute gives EPA authority to modify the design value in Subpart 2. Even in this context, the statute requires that any revised methodology be "comparable" to the methodology prescribed by Section 7511(a)(1) (which is linked to the one-hour standard), precluding the adoption of a new methodology for the significantly different eight-hour standard.

2 Attainment is measured by whether the three-year average of the annual fourth-highest daily maximum eight-hour average concentration exceeds 0.08 ppm. 40 C.F.R. § 50.10(b) (1999).

is a crucial part of the standard itself,[3] it is not possible to classify areas for the eight-hour standard using the methodology developed for the one-hour standard.

Second, even if classification were somehow possible, if Subpart 2 governs implementation of the revised NAAQS, then every area that has attained the 0.12 ppm, one-hour standard by the time of its designation under any revised NAAQS would be forever exempt from complying with the revised standard. That is so because Subpart 2 requires that "[e]ach area designated [as] nonattainment for ozone . . . be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1, in turn, contains five different ranges of design values – with each range specifying a different nonattainment classification and attainment date – but the lowest design value addressed in Table 1 is 0.121 ppm, which falls just above the current 0.12 ppm ozone NAAQS. Thus, if Subpart 2 governs the implementation of revised ozone NAAQS, the revised eight-hour, 0.08 ppm standard promulgated by EPA would not apply to any areas that meet the current one-hour, 0.12 ppm standard – which comprise the vast majority of areas likely to be above the revised, eight-hour 0.08 ppm NAAQS.[4] *See American Petroleum Inst. v. United States EPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that areas in nonattainment with the current standard but with a design value of less than 0.12 are not covered by Table 1).

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3 *See* 62 Fed. Reg. at 38,863 ("Taken together, the level and form of the standard, for a given averaging time, determine the degree of public health protection afforded by the standard. Consideration of the level of the standard . . . reflects a recognition of this linkage between level and form. . . .").

4 *See infra* at 17.

Third, if Subpart 2 governs implementation of revised ozone NAAQS, most areas that do not yet meet the current one-hour, 0.12 ppm standard – and that therefore would be required to meet the revised eight-hour, 0.08 ppm standard – (including, for example, Atlanta, Dallas, Phoenix, San Diego, St. Louis, Pittsburgh, Louisville and Washington D.C.) would be required to meet the more stringent, revised standard *immediately*. That is so because the timetables and deadlines under Subpart 2 began to run in 1990, and three of the five attainment deadlines already have passed. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1 (specifying 1993, 1996, and 1999, as well as 2005 and 2010, as attainment dates). For example, areas with current ozone levels in the range of 0.120 - 0.138 ppm ("marginal" nonattainment areas) would need to have met the revised 0.08 ppm standard in 1993, even though the revised standard was not promulgated until 1997. Moreover, having missed that 1993 attainment date, as well as the next two attainment dates (1996 and 1999), these areas would now be classified as "severe" and would *immediately* be subject to enhanced control measures, emission reduction milestones, and other requirements for severe nonattainment areas. *See generally* CAA § 182, 42 U.S.C. § 7511a.[5] Indeed, Subpart 2 would have the absurd result of rendering most of these nonattainment areas liable for punitive sanctions (including the loss of federal highway funds) even though these areas would have had no opportunity to work toward attainment. CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1); *see also* CAA § 185(b), 42 U.S.C. § 7511d(b) (penalty of $5000 per ton

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5 EPA's authority to modify the attainment dates in Table 1 is strictly limited to areas redesignated to nonattainment after having been initially designated in attainment for the one-hour standard following enactment of the 1990 amendments (*i.e.*, under Section 107(d)(4)). CAA § 181(b)(1), 42 U.S.C. § 7511(b)(1). EPA has no authority to modify the attainment dates for areas designated nonattainment for the revised standard pursuant to section 107(d)(1)(B).

imposed on major sources in certain areas that fail to attain the current standard).

In sum, any attempt to implement a revised ozone standard under Subpart 2 would be legally, technically and practically unworkable. Some currently less polluted areas would not be required to comply with the revised standard even though they would be in clear violation of it. Meanwhile, other currently more polluted nonattainment areas would have no reasonable opportunity to work towards attainment before severe sanctions were imposed on them (contrary to Congress' clear desire in enacting Subpart 2 to provide more polluted areas with more, not less, time to come into compliance). *See, e.g.*, H.R. Rep. No. 101-490, pt. 1, at 234, *reprinted in* Senate Comm. on Env't & Pub. Works, 2 *A Legislative History of the Clean Air Act Amendments of 1990*, S. Print 103-38, at 3258 (1993) ("*Legislative History*"), OJA at 3603 ("Areas with more serious pollution problems are given more time to attain the standards, but required to put in place a more aggressive program of control measures."); House Debate on the Conference Report (Oct. 26, 1990), *reprinted in* 1 *Legislative History* at 1236 (statement of Rep. Fields, co-sponsor of H.R. 3030, 101st Cong. (1990)) ("House Debate"), OJA at 3543 ("We have placed what we hope are more realistic deadlines in the new law.").

Consequently, the parties correctly agree that the statute cannot reasonably be read to permit implementation of revised ozone NAAQS under Subpart 2. *See Griffin v. Oceanic Contractors. Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("avoid . . . unreasonable results whenever possible").

II. IF THE COURT DECIDES EPA HAS AUTHORITY TO IMPLEMENT REVISED OZONE NAAQS UNDER SUBPART 1, EPA COULD CONCEIVABLY HAVE THAT AUTHORITY ONLY IN THOSE AREAS THAT HAVE ATTAINED COMPLIANCE WITH THE CURRENT NAAQS UNDER SUBPART 2

Because revised ozone NAAQS cannot practicably be implemented under Subpart 2, there are only two alternatives: (i) either revised NAAQS cannot be implemented at all (which is the thrust of Industry Respondents' argument), *or* (ii) revised NAAQS must be implemented under Subpart 1 (as EPA contends). We agree completely with Industry Respondents' view, but will not repeat their arguments here. Instead, we assume for purposes of this brief that EPA could implement the revised NAAQS under Subpart 1, and we address solely how that might be accomplished.

Judge Tatel in his concurring opinion suggested that, once an area attains the existing one-hour, 0.12 ppm standard in accordance with Subpart 2, EPA *then* might implement the revised eight-hour, 0.08 ppm standard under Subpart 1. *ATA II*, 195 F.3d at 12. EPA argues that it has the authority to require areas to comply with the revised eight-hour NAAQS and the one-hour NAAQS simultaneously. In EPA's view, because "Subpart 1 and Subpart 2 require that all areas attain the NAAQS as 'expeditiously as practicable,'" the Agency "is justified in concluding that it should implement the revised ozone standard without delay throughout the Nation." Brief for the Petitioners ("Pet. Br.") at 49.[6]

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6 *See also id.* ("It is entirely reasonable . . . for Congress to require that, once EPA determines that a revised NAAQS is necessary to protect public health, the revised NAAQS should be attained without avoidable delay *notwithstanding* the timetable that Congress envisioned for the standard then in effect.") (emphasis added).

EPA's interpretation would as a practical matter allow the Agency to override Subpart 2 entirely whenever EPA decides that the NAAQS should be revised. That interpretation cannot be squared with the statute's plain language or its legislative history.

A. Congress Enacted Subpart 2 As A Detailed And Comprehensive Framework For Implementation Of The Ozone NAAQS

Congress recognized in 1990 that attainment of the one-hour, 0.12 ppm ozone NAAQS in many areas of the country posed particular and seemingly intractable problems. Although the Act required all areas of the country to attain the NAAQS "as expeditiously as practicable but no later than December 31, 1987," 42 U.S.C. § 7502 (1988), many areas still had not attained the ozone standard by 1990. *See* H.R. Rep. No. 101-490, pt. 1, at 145-50, *reprinted in* 2 *Legislative History* at 3170-71 ("In 1977, Congress tried to waive [sic] a 'magic wand' and command that all nonattainment areas [for ozone] will meet the applicable [NAAQS] by December 31, 1982. . . . [That] date[] ha[s] come and gone and it is clear that . . . we had no 'magic' solutions"). Indeed, in 1990, 186 areas were in nonattainment,[7] and many of those areas did not even have plans for how the standard could ever be attained.

Congress addressed this situation by substantially revising the Clean Air Act to add, among other provisions, specific implementation requirements for ozone. These provisions are codified as Subpart 2 of Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7511-7511f. The Act specifically provides, moreover, that the Subpart 2 program overrides Subpart 1 in certain key respects (*e.g.*, area

7 *See* 40 C.F.R. § 81.300-.356 (1990). Areas could be as small as a single county (*e.g.*, Campbell County, Kentucky) or as large as an entire State (*e.g.*, Massachusetts).

designations and classifications for the one-hour standard).[8] *See* CAA § 172(a)(1)(C), (a)(2)(D), 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D); CAA § 181(a), (b), 42 U.S.C. § 7511(a), (b).

Recognizing that air quality in some areas was worse than in others, and that some areas would unquestionably need more time than others to attain the existing ozone NAAQS, Congress allowed the various nonattainment areas between 3 and 20 years to come into attainment, depending upon the severity of the area's ozone problem. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1. At the same time, Congress required areas with more severe nonattainment problems to impose more stringent mandated measures to reduce emissions. Congress also established "reasonable further progress," or milestone, requirements to ensure that States made steady progress towards meeting the NAAQS. CAA § 182(b)(1), 42 U.S.C. § 7511a(b)(1); *see also* CAA § 182(a), (b), (c), (d) and (e), 42 U.S.C. § 7511(a), (b), (c), (d) and (e). As discussed in the debate over the 1990 amendments, these "milestone provisions of the bill [we]re designed to avoid a repeat of the situation that occurred when [Congress] passed the 1977 amendments," which allowed States to go for years without having to demonstrate progress. *See* Senate Debate (Jan. 23, 1990), 4 *Legislative History* at 4837 (statement of Senator Chafee, co-sponsor of S. 1630, 101st Cong. (1990)).

Congress required areas classified as "serious," "severe" or "extreme" nonattainment to include "contingency plans" with specific measures that must be implemented if the area fails to meet these milestones. *See* CAA § 182(c)(9), (d) and (e), 42 U.S.C. § 7511a(c)(9), (d) and (e). Moreover, if an area misses its attainment deadline, Subpart 2 provides that the

8 *See, e.g.*, H.R. Rep. No. 101-490, pt. 3, at 3, *reprinted in* 2 *Legislative History* at 3721 ("The Clean Air Act Amendments of 1990 provide a *comprehensive* legislative framework for obtaining [*sic* – attaining] and maintaining the national ambient air quality standards.") (emphasis added).

area "bumps up" to the next classification, with a new attainment deadline but more stringent control measures. CAA §181(b)(2), 42 U.S.C. § 7511(b)(2). In summary, under Subpart 2, "[a]reas with more serious pollution problems are given more time to attain the standards, but required to put in place a more aggressive program of control measures." H.R. Rep. No. 101-490, pt. 1, at 234, *reprinted in* 2 *Legislative History* at 3258, OJA at 3603.

Subpart 2 represented a fundamental departure from the historic approach to implementing the NAAQS. Previously, the Act merely set a single overall attainment date, allowing States wide latitude in determining what controls should be imposed. CAA § 172, 42 U.S.C. § 7502 (1988). In enacting Subpart 2, Congress established a graduated series of attainment deadlines (rather than allowing EPA to set the deadlines) and at the same time stripped States of much of their discretion to determine appropriate control measures. Congress did so because the old model simply had not succeeded in resolving the ozone problem. *See* House Debate, *reprinted in* 1 *Legislative History* at 1236, OJA at 3543 (statement of Rep. Fields) ("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment are[a]s which will in turn have to impose such requirements on industry in those areas."); *see also* Senate Debate (Mar. 21, 1990), *reprinted in* 4 *Legislative History* at 6056 (statement of Sen. Baucus, co-sponsor of S. 1630, 101st Cong. (1990)) (Subpart 2 includes "a lot of requirements on [non]attainment areas to get the job done. . . . [Subpart 2] is tailored as well as it could be to help encourage those [non]attainment areas to get the job done.").

In enacting Subpart 2, Congress also consciously balanced economic and environmental considerations. *See* H.R. Rep. No. 101-490, pt. 1, at 235, *reprinted in* 2 *Legislative History* at 3259, OJA at 3604 (noting the Committee's goal of "reconcil[ing] economic growth with clean air"); *id.* at 3258, OJA at 3603 ("This program is intended to allow economic growth and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced."); House Debate, *reprinted in* 1 *Legislative History* at 1414 (statement of Rep. Oxley) ("[T]hroughout the development of this legislation, we have worked to ensure that environmental progress does not jeopardize economic growth."); House Debate (May 21, 1990), *reprinted in* 2 *Legislative History* at 2655 (statement of Rep. Shuster) ("So while we must support clean air, we must likewise be equally concerned that there be a balance, a balance that recognizes not only the importance of clean air, but the importance of providing jobs for our people and creating a continuing growing economy."). Thus, Congress crafted a compromise program that forced progress, but also set achievable goals within a reasonable timeline that took into account economic concerns.

B. Simultaneous Implementation Of The Current And Revised Ozone NAAQS Would Conflict With The Plain Language Of The Statute And Would Nullify Subpart 2's Comprehensive And Reticulated Enforcement Scheme

1. Subpart 1 – By Its Clear Terms – Does Not Apply To Areas Governed By The Attainment Dates Specified In Subpart 2.

Under EPA's interpretation, Congress gave the Agency discretion to nullify Subpart 2's comprehensive and reticulated enforcement scheme at any time simply by revising the ozone NAAQS. That interpretation cannot be – and is not – correct. As this Court has cautioned, "'[i]n our anxiety to effectuate the Congressional purpose of

protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (citation omitted) (*cited in FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000)).

Contrary to EPA's view, at a minimum, Subpart 2 must be allowed to run its course *before* any revised ozone standard can be implemented under Subpart 1. In other words, areas must be allowed to comply with the mandate of Subpart 2 until they have attained the one-hour, 0.12 ppm NAAQS. Only once they have done so could EPA conceivably have the authority to require measures to attain the more stringent eight-hour, 0.08 ppm NAAQS in accordance with the provisions of Subpart 1. The plain language of the statute forbids EPA's simultaneous-implementation approach.

While Subpart 1 (Section 172(a)(1)(A)) allows EPA generally to "classify" areas as attainment or nonattainment, the statute makes it clear that such authorization does "not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of [Part D of Title I]." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C). Similarly, while Section 172(a)(2) provides that the NAAQS attainment date for an area under Subpart 1 shall be "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment," CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A), the statute makes clear that EPA has no authority to set an attainment date "with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of [Part D of Title I]." CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D). Section 181(a)(1), Table 1 – within Subpart 2 of Part D – "specifically provides" classifications and attainment dates for areas that are not in attainment with the existing one-

hour, 0.12 ppm ozone standard. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1.

Of the approximately 3,000 "areas" in the United States, 33 currently are in *non*attainment with the one-hour ozone standard. *See* 40 C.F.R. Part 81. These 33 areas plainly are "nonattainment areas for which [classifications and] attainment dates are specifically provided" under an "other provision" of Part D – Subpart 2. Thus, under the plain language of the statute, EPA has no authority under Subpart 1 either to classify or to set attainment dates concerning a revised NAAQS for these areas. Any implementation authority that EPA might have under Subpart 1 could only be exercised once each of these 33 areas attains the one-hour NAAQS, thus ceasing to be a "nonattainment area" for which classifications and attainment dates are specifically provided under other provisions of Part D. As Judge Tatel explained in his concurrence, only this approach allows EPA to implement the revised ozone NAAQS under Subpart 1 "*without conflicting with Subpart 2's classifications and attainment dates.*" *ATA II*, 195 F.3d at 11 (emphasis added).[9]

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9 EPA insists that Judge Tatel's reading is not correct because Section 181(a) (in Subpart 2) establishes the *maximum* amount of time allowable for attainment. Pet. Br. at 48. EPA's argument is an utter non sequitor. Whether the dates in Section 181(a) are outside limits does not change the fact that, for those areas within its purview, Section 181(a) is a provision of Part D distinct from Subpart 1 which "specifically provides" attainment dates, thereby ousting – pursuant to the plain language of the Act – EPA's authority to set other attainment dates for such areas under Subpart 1. *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Where "Congress has directly spoken to the precise question at issue . . . the court . . . must give effect to the unambiguously expressed intent of Congress."); *Brown & Williamson Tobacco*, 120 S. Ct. at 1300 (same). Moreover, because Table 1 of Section 181(a) *allows* areas to take the maximum time to reach attainment, it provides no support for EPA's claim that the Agency can require these same areas to do more, and more quickly, pursuant to Subpart 1. *See, e.g.*, H.R. Rep. No. 101-490, pt. 1, at 229, *reprinted in* 2 *Legislative History* at 3253, OJA at 3598 (the deadlines in Table 1 are

Not only does the statutory language make it abundantly clear that Congress intended Subpart 2 to have primacy over ozone NAAQS attainment, but as detailed below, EPA's contrary interpretation also would permit the Agency to render Subpart 2 a nullity whenever it decides to revise the ozone NAAQS. It is inconceivable that Congress could have delegated that wholesale authority to EPA without ever saying so. *See, e.g., Brown & Williamson Tobacco*, 120 S. Ct. at 1315 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general savings clause.").

2. Simultaneous Implementation Of The Current And Revised NAAQS Would So Undermine the Purposes of Subpart 2 As To Render Subpart 2 A Nullity

Under EPA's reading of the Act, the Agency in 1991 could have revised the ozone NAAQS slightly to be, say, 0.119 ppm, using the very same one-hour averaging scheme as under the prior standard. Although virtually identical to the one-hour, 0.12 ppm NAAQS for which Congress created Subpart 2, according to EPA's logic, the Agency could have implemented this revised 0.119 ppm NAAQS under Subpart 1 *simultaneously* with implementation of the 0.12 ppm standard under Subpart 2. Indeed, under EPA's reading of the statute, the Agency could have set a dramatically more stringent NAAQS in 1991 – 0.04 ppm, for example – and demanded compliance with that substantially more stringent standard in only five years.[10]

"intended to provide a reasonable target for a large class of nonattainment areas").

10 *See* CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A). In contrast, Congress expressly granted Los Angeles twenty years to meet the 0.12 ppm NAAQS under Subpart 2, giving Chicago, New York City and Houston 17 years and Baltimore, Philadelphia and Sacramento 15 years. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1).

These examples demonstrate dramatically that, under EPA's view of the statute, the Act gives EPA the discretion to use Subpart 1 to supersede Subpart 2 whenever EPA revises the NAAQS. That is surely not what Congress intended. As the D.C. Circuit noted, EPA's explanation "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2; under EPA's interpretation, that scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, 1050 (D.C. Cir. 1999) ("*ATA I*").

There is no need, however, to resort to hypotheticals: Simultaneous enforcement of the eight-hour, 0.08 ppm ozone NAAQS that EPA actually adopted also would frustrate the intent of Subpart 2 because it would require several of this country's largest metropolitan areas to comply with the Agency's more stringent, revised NAAQS within the same period – or even faster than – Congress established in Subpart 2 for attainment of the existing standard.

Under Section 107(d) of the Act, EPA was required to designate all areas as attainment or nonattainment within two years after revising the NAAQS in 1997. CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i). Congress in subsequent legislation, however, delayed this deadline by a year, to 2000 (although it expressly took no position on the validity of the revised ozone NAAQS itself). Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §§ 6102(d), 6103(a), (b), 112 Stat. 107, 464-65 (1998). Subpart 1 requires attainment with the NAAQS "as expeditiously as practicable, but no later than 5 years" from the date an area was designated nonattainment. CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A). While EPA may provide up to a five

year extension of the attainment deadline, Congress intended such extensions to be used sparingly. *See* S. Rep. No. 101-228, at 25 (1990), *reprinted in* 5 *Legislative History* at 8365 ("Except in unusual circumstances of severe levels of pollution and pollution sources that are exceptionally difficult to control, areas designated nonattainment should be required to achieve the health standards in, at most, five years from the date they are designated nonattainment. If the Administrator determines that attainment in five years is not feasible because of unusual circumstances, the extension should be for the *minimal* time needed, not automatically for an additional five years") (emphasis added).

As a result, the attainment deadline for all areas under the revised eight-hour ozone NAAQS is no later than 2005 (unless EPA grants the full five year extension to 2010).[11] Moreover, because EPA currently requires that an area have three years of clean data before it is deemed to meet the standard, an area effectively must have air that is clean enough to meet the revised standard by 2002 (or 2007 with the maximum extension). Memorandum from EPA Office of Air Quality Planning & Standards, *Proposed Implementation Guidance for the Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS) and the Regional Haze Program* 1, 83 (Nov. 17, 1998). Under the comprehensive ozone attainment scheme established pursuant to Subpart 2, however, Los Angeles has until 2010 to attain the one-hour standard, and

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11 Upon application by the State, EPA may grant two additional "Extension Years," but only if an area has had "no more than a minimal number of exceedances" of the NAAQS "in the year preceding the Extension Year." CAA § 172(a)(2)(C)(ii), 42 U.S.C. § 7502(a)(2)(C)(ii). Accordingly, an area cannot receive an "extension" until the year by which it is required to meet the NAAQS, and then only if the area is very close to attainment. Because they cannot be granted in advance, these "Extension Years" cannot be counted when determining attainment deadlines.

several other major metropolitan areas – Chicago, Houston, and New York City, among others – have until 2007 to reach attainment.[12] Thus, under EPA's simultaneous-implementation scheme, these areas could be required to meet the more stringent 0.08 ppm eight-hour ozone standard under Subpart 1 somewhat before being required to attain the less stringent one-hour standard under Subpart 2. Congress plainly never intended that result.

Indeed, even if EPA granted all of these areas the ten-year maximum to meet the revised standard, these areas still would be required to continue to implement current control measures to attain the 0.12 ppm one-hour standard while simultaneously implementing more substantial measures to attain the more stringent 0.08 ppm eight-hour standard. Otherwise, an area could not feasibly achieve the first year of "clean air" under the revised eight-hour standard at the same time it meets the 2007 Subpart 2 attainment deadline.[13]

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12 Los Angeles is the only area with a 2010 attainment deadline. The following areas have 2007 attainment deadlines: Chicago-Gary-Lake County, IL-IN; Houston-Galveston-Brazoria, TX; Milwaukee-Racine, WI; New York-N. New Jersey-Long Island, NJ-NJ-CT; Southeast Desert Modified AQMA, CA. *See* 40 C.F.R. Part 81.

13 EPA claims that it is not unusual for areas to be subject to more than one NAAQS at a given time, Pet. Br. at 49, n.31 (citing 40 C.F.R. §§ 50.4(a)-(b), 50.8(a)(1)-(2)), but neither of the references cited by EPA involve two standards for the same pollutant that are intended to address the same health effects and are implemented simultaneously under separate statutory schemes.

Specifically, 40 C.F.R. § 50.4(a) and (b) sets two primary standards for sulfur oxides (SO_x): A twenty-four-hour standard (0.14 ppm) and an annual (0.03 ppm) standard. The preamble in the rule establishing these standards clearly states that the one-hour SO_x standard was specifically meant to protect against spikes, whereas the annual SO_x standard is meant to guard against chronic problems. 61 Fed. Reg. 25,566, 25,579 (1996).

EPA's other reference, 40 C.F.R. § 50.8(a)(1) and (2), establishes two primary standards for carbon monoxide (CO): A one-hour (35 ppm) standard and an eight-hour (9 ppm) standard. Only the eight-hour CO

For these areas – as well as areas such as Baltimore, Philadelphia and Sacramento, which have 2005 attainment deadlines under Subpart 2 – EPA's simultaneous-implementation approach will, at a minimum, impose tremendous additional costs that Congress never contemplated or approved when it enacted Subpart 2. Los Angeles alone, for example, currently spends $1.7 billion per year to reach attainment with the one-hour NAAQS.[14] According to EPA, "full attainment costs of the selected [revised] standard are estimated at $9.6 billion per year *incremental* to the current standard." EPA Office of Air Quality Planning and Standards, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards & Proposed Regional Haze Rule* ES-13, 9-1 (July 16, 1997) ("EPA RIA") (emphasis added). EPA acknowledges its cost estimates are incomplete, however, because new technologies will need to

standard is used in determining attainment status, however. *See* CAA § 186(a), 42 U.S.C. § 7512(a). Thus, the two primary standards for CO and SO_x are factually distinguishable from the one-hour and eight-hour ozone standards. More importantly, neither the primary standards for CO nor those for SC_x have dual implementation schemes.

14 South Coast Air Quality Management District, *Socioeconomic Report for the 1997 Air Quality Management Plan* ES-2 (last modified Jan. 10, 1997) <http://www.aqmd.gov/aqmp/97aqmp>. This cost is estimated to result in an annual 2,264 jobs forgone in Los Angeles. *Id.* While other areas tend not to publish the estimated costs of ozone attainment, the cost of implementing extensive emissions reduction programs clearly is substantial. *See, e.g.*, New York State Dep't of Envtl. Conservation Air Resources, Draft Ozone Attainment Demonstration for the New York City Metropolitan Area Including Portions of Connecticut & Northern New Jersey (last modified July 1998) <http://www.dec.state.ny.us/website/dar/reports/comment.html> (proposed Standard Implementation Plan ("SIP") for the one-hour NAAQS for New York City-Northern New Jersey-Long Island); Texas Natural Resources Conservation Commission, Houston-Galveston Clear Air Rules and Plans (last modified Aug. 23, 2000) <http://www.tnrcc.state.tx.us/oprd/hgasip.html> (proposed SIP for the Houston-Galveston area).

be developed to allow some areas to reach attainment with the eight-hour standard. *See id.*[15]

EPA's approach – of requiring areas such as Baltimore, Chicago, Houston, Los Angeles, New York City, Philadelphia, and Sacramento to do more, and more quickly, than was provided under Subpart 2 – frustrates the purposes of Subpart 2. Indeed, Congress set forth specific emission reduction milestones in Subpart 2: in order to show "reasonable further progress" toward attainment, areas currently classified as moderate or above must achieve emission reductions of 15 percent over the period from November 1990 to November 1996. CAA § 182(b)(1)(A), 42 U.S.C. § 7511a(b)(1)(A). In addition, areas currently classified as serious or above must achieve at least a 9 percent reduction in emissions over each 3 year period from 1996 until attainment. CAA § 182(c)(2)(B), 42 U.S.C. § 7511a(c)(2)(B). In other words, Congress in Subpart 2 mandated slow but steady progress towards meeting the NAAQS.

While Subpart 1 includes no specific reduction mandates, as a practical matter States would be required to impose

15 Indeed, EPA has acknowledged that some areas will not be capable of attaining the revised standard by 2010. *See* EPA RIA at ES-4, 4-69; *see also id.* at 9-3 ("[T]hese areas [with the most difficult air quality challenges will] achieve approximately *one third of the reductions needed* to attain the new standards in 2010.") (emphasis added). According to EPA, these areas will have to rely on control technologies that have not even been developed in order to meet the revised standard. *See id.* at 9-2 ("However, for some of the areas with the most difficult air quality challenges, substantial technological advance is needed."). The RIA stresses that "EPA wishes to pursue an approach analogous to that established by Congress in [Subpart 2,] section 182(e)(5)," which allows States to rely on new and developing technologies that are not currently available for purposes of demonstrating that their most serious nonattainment areas will attain the NAAQS. *Id.* at 9-14. In other words, EPA intends to incorporate a provision in Subpart 2 into its attainment program under Subpart 1 to make it easier for areas struggling with the current standard to show they can achieve attainment with the revised standard.

more stringent emission reduction targets to meet the deadlines for attaining the revised NAAQS. *See, e.g.*, CAA § 179(d)(2), 42 U.S.C. § 7509(d)(2) (if an area fails to attain the relevant standard, EPA may reasonably prescribe *any* measure that can be feasibly implemented in the area). Simultaneous implementation of more stringent emission reduction milestones under Subpart 1 would undermine Congress' careful balancing in Subpart 2 of environmental and economic concerns.

Congress cannot have intended to permit EPA so easily to subvert the carefully wrought attainment scheme for the existing NAAQS that Congress created in Subpart 2. When faced with similarly "'comprehensive and reticulated'" statutes, this Court has noted its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (citation omitted); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) (In evaluating "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests . . . , [w]e will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.").[16] Similarly here, adopting EPA's reading of the statute would tamper with the comprehensive implementation scheme enacted in Subpart 2, thereby changing the balance struck by Congress between environmental protection and economic realities.[17]

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16 As the D.C. Circuit found, "[t]hat Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2." *ATA I*, 175 F.3d at 1049. The "wide discretion [that EPA claims under Subpart 1] is inconsistent . . . with Subpart 2, in which the Congress stripped the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment." *Id.*

17 The D.C. Circuit held that, because Subpart 2 applies only to the primary ozone NAAQS, it does not preclude EPA from requiring attainment of the secondary ozone NAAQS "as expeditiously as practicable." *ATA II*, 195 F.3d at 10. That holding cannot be correct. The statute clearly establishes that areas are to focus first on attainment of the primary standards: both Subpart 1 and Subpart 2 provide that primary standards are to be attained "as expeditiously as practicable, but no later than" a date certain. CAA § 172 (a)(2)(A), 42 U.S.C. § 7502(a)(2)(A); CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). While secondary standards also must be attained "as expeditiously as practicable," the statute establishes no firm attainment deadline for such standards, *see* CAA § 172(a)(2)(B), 42 U.S.C. § 7502(a)(2)(B), demonstrating both that Congress considered secondary standards (which protect "public welfare" as opposed to "public health") to be a lower priority and that Congress expected attainment of secondary standards generally to occur *after* attainment of primary standards. Congress clearly did not intend to allow EPA to circumvent the comprehensive and reticulated attainment program it established under Subpart 2 for the primary standard by implementing a more stringent *secondary* standard under Subpart 1. Indeed, Congress's express determination that areas must be allowed to take the full amount of time specified in Table 1 of Subpart 2 to reach attainment should flatly foreclose EPA from requiring areas to comply more quickly with a more stringent primary *or* secondary NAAQS.

CONCLUSION

The statutory language and legislative history make abundantly clear that Congress intended Subpart 2 to serve as the comprehensive and exclusive framework for implementation of the ozone NAAQS. If the Court finds that EPA can implement revised NAAQS under Subpart 1, however, EPA could conceivably do so, consistent with the text, structure, and history of the Act, only in areas that have already attained the one hour ozone NAAQS pursuant to Subpart 2. *Amici* take no position on Questions 1 and 2 presented by EPA in its brief.

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